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IN THE

Supreme Court of the United States

October Term, 1966

No. ~~1480~~ 199

MARGUERITE LOVELETT NOWELL,
Petitioner,

vs.

AMES NOWELL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS AT DALLAS.

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Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas entered on October 28, 1966.

OPINIONS BELOW.

The opinion of the Court of Civil Appeals for the

Fifth Supreme Judicial District of Texas at Dallas is reported in 408 S.W. 2d 550 (Texas Civ. App. 1966). A copy of that opinion is attached hereto in Appendix I.

The Supreme Court of Texas dismissed the petitioner's application for a writ of error, without opinion.

There was no written opinion of the trial court (Domestic Relations Court of Dallas County).

JURISDICTION.

The judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas was made and entered on October 28, 1966. Petitioner's motion to reargue was filed on November 10, 1966 and was overruled on November 18, 1966. The petitioner's application for writ of error was dismissed by the Supreme Court of Texas on February 1, 1967; and on March 1, 1967 the petitioner's motion for re-hearing of application for writ of error was overruled by that Court. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3).

QUESTIONS PRESENTED.

The questions presented are:

1. Whether the Texas proceedings culminating in a divorce and orders affecting property rights, over the timely objections of a non-resident defendant, were in violation of the due process clauses of

the Fifth and Fourteenth Amendments so as to void the jurisdiction of the Texas courts.

2. Whether the Texas Domestic Relations Court's refusal to recognize the prior pending jurisdiction of the Connecticut Superior Court, and the disregard by the Texas Court on the injunctions issued by the Connecticut Superior Court constituted a violation of the doctrines of (a) full faith and credit, and (b) comity, as provided in Article IV, Sec. 1 of the United States Constitution; and whether the same constituted an undue interference with the jurisdiction of the Connecticut courts in violation of Article IV Sec. 1 of the United States Constitution and in violation of the due process clause as contained in the Fifth and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

1. The statutes involved are Sec. 46-29 and 46-30 of the General Statutes of Connecticut, Revision of 1958, (Vol. VIII pp. 149, 150). These statutes are set out in full in Appendix II.

2. The provisions of the Constitution of the United States which are relied upon, are portions of the Fifth Amendment and Fourteenth Amendment, set out in Appendix III, and Article 4, Section 1, which reads as follows:

"Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Pro-

ceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

STATEMENT.

Married on April 6, 1957, Ames and Marguerite moved to Connecticut in 1959. The petitioner Marguerite brought suit for divorce (later amended to claim a legal separation) in Connecticut in November, 1962, achieving personal service on Ames in Darien, Connecticut on November 14th, 1962. Ames thereupon appeared personally and by attorney in the Connecticut action, and was ordered to pay monthly alimony, which he did in fact pay for a period of time.

The Connecticut action was referred to a state referee who conducted hearings on various dates during 1964 and 1965 and who rendered his report on August 24th, 1965, finding the facts in favor of petitioner, Marguerite, finding the respondent Ames guilty of intolerable cruelty, and recommending a permanent support award.

In March, 1965, the respondent Ames filed an annulment petition in Texas. On March 24th, 1965, the Connecticut Superior Court enjoined the respondent Ames:

> "either directly or indirectly, personally or by his agents or attorneys, from prosecuting, pursuing, proceeding or, in any manner whatsoever, from taking action in or with regard to a certain law-

> suit in the Juvenile Court of Dallas, Dallas County, Texas, or in any other jurisdiction of the State of Texas, or any other State, until the principal cause, as above captioned, shall have been heard or until further order of this Court."

It is to be noted that by virtue of the original personal service on Ames, the Connecticut Superior Court had personal jurisdiction to issue the injunction.

On March 15th, 1965, the respondent Ames had filed the instant divorce action in Texas, but made no attempt to notify the petitioner Marguerite of its pendency or to serve any papers upon Marguerite until September 2, 1965, some nine days after the Connecticut referee had rendered his report in favor of petitioner Marguerite. On September 9, 1965, the petitioner Marguerite obtained another injunction from the Connecticut Superior Court enjoining him:

> "either directly or indirectly, personally or by his agents or attorneys, from prosecuting, pursuing, proceeding or, in any manner whatsoever, from taking action in or with regard to a certain lawsuit in the Court of Domestic Relations in and for Dallas County, Texas, or in any other Court of the State of Texas, or in any other action concerned with the relationship of the parties as husband wife either in any Court of the State of Texas, or any other state, until the principal cause, as above captioned, shall have been determined or until further order of this Court."

The respondent made no attempt to appeal the

September 9th injunctive order, but he did thereafter move to erase the same; the motion to erase was heard and denied and respondent's appeal from denial of the same was dismissed by the Connecticut Supreme Court.

The petitioner Marguerite appeared specially in the Texas Domestic Relations Court, challenged jurisdiction and pled in abatement, claiming lack of jurisdiction over her person, claiming the pendency of the Connecticut action, and claiming the Connecticut injunctions. These claims were overruled, and thereafter judgment was entered granting Ames a divorce and purporting to divide and settle title to the various properties of the parties, whence the petitioner appealed.

In the meanwhile, the Connecticut action proceeded through the necessary steps to final judgment, the respondent Ames appealed, and said appeal is pending before the Supreme Court of Connecticut.

PRESENTATION OF THE FEDERAL QUESTIONS.

The claims relating to personal jurisdiction were first raised by the petitioner in paragraph 1 of her first and second sworn motions challenging jurisdiction, filed in the Domestic Relations Court in Dallas. They were further raised in the plea in abatement, and in the first amended plea in abatement, paragraph 3.

These claims were overruled by the trial court without opinion (judgment, dated December 15th, 1965, page 1).

Said claims were raised before the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas in the Points of Error, First Point and Fifth Point.

The Texas appellate court recognized that the issue had been raised:

> " . . . . defendant filed her motion challenging the jurisdiction of the Texas court on the grounds (a) that she was not a resident of the State of Texas. . . ."
>
> (408 S.W.2d 550, 551; Appendix I, p. 1a)
>
> "On September 16th, 1965, Marguerite Nowell filed her sworn motion in the Texas suit challenging the jurisdiction of the court over her person. . . ."
>
> "On September 24th, 1965, Marguerite Nowell filed her sworn motion . . . . challenging the jurisdiction of the Texas court over her person. . . ."
>
> (408 S.W.2d 550, 552; Appendix I, p. 4a)

The Texas appellate court did not expressly consider these issues, but overruled the petitioner's claims by its decision:

> "Finding no merit in any of the appellant's Points of Error, the same are overruled, and the judgment of the trial court is affirmed."
>
> (408 S.W.2d 550, 556; Appendix I, p. 15a)

The second federal question, the interference with the Connecticut Superior Court's jurisdiction and the claim of full faith and credit and comity, was initially raised in the petitioner's two sworn motions challenging jurisdiction, paragraphs 5 and 6.

The question was further raised in the first amended plea in abatement, Par. 5, where the full faith and credit clause was specifically invoked. These claims were denied and overruled by the trial court, without opinion (Judgment, dated December 15, 1965).

These claims were again presented to the trial court on the petitioner's Original Motion for New Trial, Par. 4c, 5b, 6c. This motion was denied by the trial court.

Subsequently these claims were presented to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas in the Points of Error presented before that Court, Second Point, Third Point, Fifth Point, Sixth Point.

The Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas stated:

> "We are convinced, and so hold, that the Texas court did not abuse its discretion in denying Appellant her plea to the jurisdiction and plea in abatement . . . Appellant's Points 1 through 6 inclusive are overruled."
>
> (408 S.W.2d 550, 555; Appendix I, pp. 11a, 12a)

REASONS FOR GRANTING THE WRIT.

The Texas court has gone considerably beyond the limitations of due process in adjudicating the financial relationships of the petitioner and her respondent husband. At no time has the petitioner resided in Texas. The Texas court did have the power to render a divorce alone without personal service on this non-resident defendant, but such a determination would affect only the **status** of AMES NOWELL towards a non-resident, which determination would be binding in the State of Texas on the question of marital **status** alone. **Haddock v. Haddock,** 201 U.S. 562, 26 S.Ct. 525, 50 L.ed. 867; **Pennoyer v. Neff,** 95 U.S. 714, 734, 24 L.ed. 565; **Maynard v. Hill,** 125 U.S. 190, 8 S.Ct. 723, 31 L.ed. 654; **Cheeley v. Clayton,** 110 U.S. 701, 705, 4 S.Ct. 328, 28 L.ed. 298; **Cikora v. Cikora,** 133 Conn. 456, 459, 52 A.2d 310; **Carter v. Carter,** 147 Conn. 238, 241, 159 A.2d 173.

While a court may so determine status without personal jurisdiction, nevertheless, no court may render an in personam judgment affecting the monetary rights of the parties or their property without personal jurisdiction. **Pennoyer v. Neff,** 95 U.S. 714, 734, 24 L.ed. 565.

Even beyond the question of personal jurisdiction, the Texas courts have failed to give full faith and credit to the judicial proceedings in the Connecticut Superior Court.

Failure to render full faith and credit to a foreign judgment constitutes good grounds for granting a

petition for certiorari. **Aldrich v. Aldrich,** (W.Va. 1964) 378 U.S. 540, 84 S.Ct. 1687, 12 L.ed.2d 1020.

The temporary injunctions issued by the Connecticut Superior Court were final and were appealable and required immediate obedience. **Walden v. Siebert,** 102 Conn. 353, 360, 128 Atl. 702.

These injunctions were not subject to retroactive modification and were entitled to full faith and credit. The Texas court should have recognized that it was interferring with the Connecticut Superior Court jurisdiction, and should have recognized the injunctions, if not by full faith and credit, at least by comity. **Blanchard v. Commonwealth Oil Company,** (5th Cir., 1961) 294 F.2d 834; **Cole v. Cunningham,** 133 U.S. 107, 116, 117, 10 S.Ct. 269, 33 L.ed. 538.

Although the injunctions were temporary, the Texas courts were required by the Constitution to give these injunctions the same effect and recognition as they would be given in Connecticut. **Aldrich v. Aldrich,** (W.Va. 1964) 378 U.S. 540, 84 S.Ct. 1687, 12 L.ed.2d 1020; **Walden v. Siebert,** 102 Conn. 353, 360, 128 Atl. 702.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully Submitted,

EDGAR W. BASSICK, III,
Counsel for Petitioner.

APPENDICES

APPENDIX I.

OPINION OF THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS AT DALLAS.

Divorce action. Ames Nowell instituted this action in the Domestic Relations Court of Dallas County, Texas against Marguerite Lovelett Nowell in which he sought a divorce and adjudication of property rights. Defendant wife, a resident of the State of Connecticut, was served with citation in that state. Pursuant to Rule 120a, Vernon's Texas Rules of Civil Procedure, defendant filed her motion challenging the jurisdiction of the Texas court on the grounds (a) that she was not a resident of the State of Texas, (b) that the plaintiff was not a bona fide resident of the State of Texas, (c) that there was a prior suit pending in the State of Connecticut, being a suit for legal separation and equitable support involving the same parties and same subject matter, and (d) that at the time of attempting service upon defendant, plaintiff was under an injunction issued in the Connecticut suit prohibiting him from proceeding with the Texas action. Defendant also filed her plea in abatement asserting the same grounds as were contained in her motion challenging jurisdiction and asking the court to grant comity to Connecticut and the injunctions issued and to dismiss or abate the Texas action. The trial court overruled both pleas and the case proceeded to trial before a court and a jury. Following jury verdict, judgment

was entered granting plaintiff husband a divorce from defendant wife and also ordering disposition of certain property of the parties. This appeal follows.

FACTS.

Ames Nowell and Marguerite Lovelett were married April 6, 1957. In November of 1962 Marguerite Nowell filed suit in the Superior Court of Fairfield County, Connecticut against Ames Nowell seeking a divorce. Ames was served personally in Connecticut. Shortly thereafter Marguerite amended her suit and changed the cause of action from that of divorce to one seeking legal separation and equitable support under the provisions of Section 46-29 of the Connecticut General Statutes, Revision of 1955.*

Ames Nowell appeared in person in the Connecticut suit and that court entered an order requiring

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*"In any case in which a divorce might be decreed, the superior court, on petition of the party who would be entitled to a divorce, may decree a legal separation of the parties, which separation shall have in all respects the effect of a divorce, except that the parties shall not be free to marry any third person and except as hereinafter provided. Upon such petition the procedure shall be the same as in actions for divorce, and the court shall have the same power in all matters relating to temporary and permanent orders for alimony, custody and support of children, and to allowances, as in cases of divorce. The parties to such action may at any time resume marital relations, upon filing with the clerk of the superior court for the county in which the separation was decreed their written declaration of such resumption, signed, acknowledged and witnessed. Such declaration shall be en-

the husband to pay alimony to the wife in the sum of $1,650 per month. The merits of the Connecticut action had been submitted by the Connecticut court judge to a referee who conducted hearings thereon beginning September 29, 1964.

Ames Nowell left the State of Connecticut and eventually came to Texas and filed an action in the Juvenile Court of Dallas County, Texas seeking an annulment of the marriage. On March 24, 1965 the Connecticut court entered a temporary injunction order forbidding Ames from "either directly or indirectly, personally or by his agents or attorneys from prosecuting, pursuing, proceeding or in any manner whatsoever from taking action in or with regard to a certain lawsuit in the Juvenile Court of Dallas, Dallas County, Texas, * * *." No further action was taken on the annulment suit in Texas.

On March 15, 1965 Ames Nowell filed the instant suit for divorce. After service was accomplished in

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tered upon the docket, under the entries relating to such petition."

Section 46-30 provides:

"At any time after the entry of a decree of legal separation, either party may petition the superior court for the county where such decree was entered for a decree finally dissolving and terminating the marriage and, if the court finds that the parties have not resumed marital relations since the entry of the decree of legal separation, it may enter a decree finally dissolving and terminating the marriage and may affirm or modify any existing orders and may enter any additional orders relating to alimony, custody and support of children and allowances as are usual in divorce cases."

Connecticut Ames Nowell filed an application for, and the Domestic Relations Court of Dallas County, Texas issued on September 7, 1965, an order temporarily restraining Marguerite Nowell from taking any action in her Connecticut suit which might interfere with the divorce suit pending in Texas. Marguerite Nowell was served with notice of said restraining order in the forenoon of September 9, 1965. In the afternoon of the same date, September 9, 1965, Marguerite Nowell obtained a temporary injunction in the Connecticut court against Ames Nowell forbidding him from taking any further action in the divorce case in Texas, or in any other state, pending final disposition of the Connecticut case.

Prior to these proceedings, and on August 24, 1965, the referee had returned to the Connecticut court a report of his findings wherein it was found that Marguerite Nowell was entitled to equitable support.

On September 16, 1965 Marguerite Nowell filed her sworn motion in the Texas suit challenging the jurisdiction of the court over her person in temporary injunction proceedings and in which she specifically pleaded all relevant facts relating to the pending Connecticut suit and the temporary restraining order issued against Ames Nowell in Connecticut. This motion was denied.

On September 24, 1965 Marguerite Nowell filed her sworn motion pursuant to Rule 120a, T.R.C.P., challenging the jurisdiction of the Texas Court over her person and setting forth the material facts relating to the prior suit pending in Connecticut and

the injunctions issued therein. This motion was heard by the Texas court on October 22, 1965 and was overruled.

Marguerite Nowell filed a plea in abatement in the Texas action on October 25, 1965, and amended the same on December 8, 1965, in which she set forth specifically and in detail all of the material facts relating to the prior suit pending in Connecticut and the injunction issued against Ames Nowell therein. This plea was heard on December 9, 1965 and overruled.

At the time the Texas court heard the plea to the jurisdiction and pleas in abatement the report of the referee in the Connecticut action had not been acted upon by the judge of the Connecticut court and the Connecticut action was still pending.

The case proceeded to trial in the Texas court on December 15, 1965 and after hearing voluminous testimony the trial court submitted the case to the jury on special issues, all of which were answered favorably to Ames Nowell. Based upon such verdict the trial court entered judgment for divorce in favor of Ames Nowell and also ordered certain disposition of property of the parties.

OPINION.

By her first six points of error appellant contends that the trial court erred in overruling her plea to the jurisdiction and also her plea in abatement because at the time of hearing of said motion and plea

there was pending in the State of Connecticut a suit previously filed and involving the same parties and subject matter, as well as anti-suit injunctions issued in the Connecticut court and that under the doctrine of comity the Texas court should have taken cognizance of the Connecticut action and injunctions and refused to entertain jurisdiction of the controversy.

By these points appellant does not attempt to assert the existence of a prior final judgment of a sister state and thereby invoke the protection of the Full Faith and Credit provision of our Federal Constitution. Instead, she seeks to apply the familiar doctrine of comity.

Comity has frequently been defined as the recognition that one sovereignty allows within its territory to the legislative, executive, or judicial act of another sovereignty, having due regard to the rights of its own citizens. The rationale of the doctrine is founded on mutual interest, conscience and moral necessity to do justice in order that justice may be done in return. 12 Tex. Jur. 2d, **Conflict Of Laws**, § 2, p. 304. Comity is not a matter of right. The doctrine does not stand boldly clad in the armor of unyielding obedience but is rather arrayed in vestments of persuasion. Being voluntary and not obligatory, the application of comity vests in the sound discretion of the tribunal of the forum.

The prevailing rule in Texas has been aptly stated in **Mills v. Howard**, 228 S.W.2d 906, Civ. App., as follows:

"While, as we have said, the pendency of a

> prior suit involving the same parties and subject matter strongly urges the court of the local forum to stay the proceedings pending determination of the prior suit, yet the rule is not mandatory upon the court nor is it a matter of right to the litigant. It is, after all, a matter resting within the sound discretion of the court."

A resolution of the question of abuse of discretion in such a case necessarily demands a close inspection of the two pending actions. To secure the abatement of a subsequent suit because of the pendency of a prior one it is, as a general rule, necessary that the two suits involved in the same cause of action, concern the same subject matter, involve the same issues, and seek the same relief. 1 Tex. Jur. 2d, § 34, pp. 56-57. "One test to determine whether causes of action are identical is to ascertain whether the parties could obtain all the relief in the prior suit that they would be entitled to in the subsequent action." 1 Tex. Jur. 2d, § 35, p. 59. Appellant, while candidly conceding that the action maintained by her in Connecticut is not a divorce action but one for separate maintenance under the Connecticut statute, contends that the parties are identical and that there is such a similarity of issues as to call into play the doctrine of comity. We cannot agree with appellant in this regard. The action pending and relief sought in the Connecticut court were not the same as that in the Texas court.

A very similar situation was presented to the El Paso Court of Civil Appeals in **Perusse v. Perusse,** 402 S.W.2d 931 (1966). In that case the parties had been married in New York and the husband moved

to Texas and filed an action for divorce in the Texas court. The wife instituted a divorce proceeding in the circuit court in Maryland wherein she sought a divorce **"a mensa et thoro"** pursuant to the provisions of Art. 16, Sec. 25 of the Annotated Code of Maryland. The wife filed her plea in abatement in the Texas action seeking to have the Texas divorce proceeding abated because of the pendency of the Maryland proceeding. The plea in abatement was sustained by the District Court and the Court of Civil Appeals, after reviewing the authorities, reversed and rendered the judgment thereby holding that the doctrine of comity should not have been applied under the peculiar facts and circumstances of that case. Since the situation is so similar we quote from the opinion which we feel has application to this action:

> "The record shows that at the time appellant filed his amended petition, which complied then with the residential requirements for a divorce suit in Texas, the appellee had filed for a divorce 'a mensa et thoro' in Maryland which, according to the references in the record here, is actually, viewed from a Texas standpoint, a legal separation and not an absolute divorce. For example, neither party can re-marry, and for other purposes, such as adultery, both parties are considered to be still married. Therefore, the plea in abatement filed attemped to abate a suit in Texas which was for a complete and final divorce, on the basis that a suit for legal separation had been filed in Maryland. It has long been held that a cause may be abated only where both actions or causes of action are the same and ask

for the same relief. 1 C.J.S. Abatement and Revival § 40; 1 Tex. Jur. 2d, Abatement and Revival, § 34; **Payton v. Hurst Eye, Ear, Nose & Throat Hosp. & Clinic** (Tex. Civ. App.), 318 S.W.2d 726 (reh. den.); **Hatten v. City of Houston** (Tex Civ. App.) 373 S.W.2d 525 (err. ref., n.r.e.). A full and complete divorce comparable to that sought by appellant in Texas is described by the Maryland laws as a divorce 'a vinculo matrimonii'. It is clear, therefore, that at the time the court here heard the matters involved, and issued its two orders, that the appellee in the Maryland court had not filed or asked for anything more than a 'bed and board' legal separation. This, in our opinion, would not suffice to abate the complete divorce decree asked for by appellant. This matter is well set out in 31 A.L.R.2d 442, which states the following at page 447:

" 'On the other hand, the pendency of action between the same parties for separation on the ground of abandonment and non-support was held not to bar an action for absolute divorce in **Hall v. Hall** (1912) 150 App Div 688, 135 NYS 741. The decision was rested on the ground, among others, that "the two actions are brought on different grounds for different relief," the court relying upon **Conrad v. Conrad** (1908) 124 AppDiv 780, 109 NYS 387, where it was held that it was not proper to unite in the same complaint a cause of action for absolute divorce and one for separation on the ground of abandonment.

" 'That an action for an absolute and one

> for a limited divorce are based on different causes of action was also intimated in **Cook v. Cook** (1912) 159 NC 46, 74 SE 639, 40 LRA NS 83, Ann Cas 1914A 1137, Infra, § 4, under heading "Where defendant in first action has not asked for affirmative relief." '
>
> "Therefore, it seems clear to us, and we so hold, that at the time the court signed its final order abating the suit in Texas (the date of which was December 10, 1965), there was no suit filed anywhere legally comparable to the one pending in El Paso County."

Appellee places great reliance upon the opinion of the Court of Civil Appeals in **Evans v. Evans,** 186 S.W.2d 277 but a close examination of that case clearly illuminates the distinguishing features which render the decision inapplicable here. In that case the husband instituted an action for divorce in the State of Ohio and then moved to Texas where he instituted another suit for divorce, seeking the same relief. Moreover, in the **Evans** case plaintiff left his property in Ohio and had none in Texas at the time he filed the second action. The Texas court held that **Evans,** having chosen the forum, should have continued to proceed therein to final judgment rather than seek relief in the Texas action. In this suit appellee did not institute the Connecticut action. He came to Texas, as he had a perfect right to do, bringing with him his property, established a residence here and proceeded to file a suit for a divorce pursuant to Texas law.

Appellant advances the argument that since the

appellee husband violated the anti-suit injunctions issued in the Connecticut court that he may not now be protected by Texas law. As stated in the recitation of the facts above the first anti-suit injunction issued in the Connecticut court was against appellee proceeding any further with the suit he had filed in Texas in the Juvenile Court seeking an annulment. Appellee did not violate this injunction but proceeded no further with the prosecution of the annulment action. The second anti-suit injunction issued in the Connecticut court was granted subsequent to the issuance and service of the Texas anti-suit injunction restraining appellant from proceeding further with interference of the prosecution of the Texas divorce action. Moreover, the record discloses that the Connecticut injunction was issued ex parte with no notice being served upon appellee. Under these circumstances we see no merit in appellant's contention relating to this phase of the case. Moreover, we have heretofore pointed out the dissimilarity of the two actions pending in Connecticut and Texas.

It has often been held to be improper to enjoin a bona fide resident of another state from prosecuting an action for divorce in the state of his residence. **Stultz v. Stultz,** 104 A.2d 656; **Brown v. Brown,** 93 A.2d 616; **Usen v. Usen,** 13 A.2d 738; **Garvin v. Garvin,** 96 N.E. 2d 721; **Kleinschmidt v. Kleinschmidt,** 99 N.E.2d 623; 27 C.J.S., DIVORCE, p. 690; 128 A.L.R. 1480.

We are convinced, and so hold, that the Texas court did not abuse its discretion in denying appellant her plea to the jurisdiction and plea in abatement. Simply stated, the Connecticut court did not

have jurisdiction of these parties in any action for divorce. Appellee had ceased to be a resident of Connecticut for more than a year before he moved to Texas and became a resident of this state. That he had a right to leave Connecticut and move to any state of his choice cannot be denied. Appellee had every right in law to institute and prosecute an action for divorce in accordance with the laws of his new domicile. Appellant's points 1 through 6 inclusive are overruled.

By her points of error 7 through 13 appellant contends that there was no evidence, or that the evidence was wholly insufficient, to establish the necessary residential requirements of appellee in Texas so as to give the trial court jurisdiction over either appellant or appellee. She also contends that the answer of the jury to Special Issue No. 1 to the effect that appellee had established residence in Texas was not supported by the evidence or was contrary to the great weight and preponderance thereof.

In support of these points appellant points to the fact that plaintiff's original petition was filed on March 15, 1965 and that in such petition appellee had alleged that he was a resident of the State of Texas for twelve months and the City of Dallas six months immediately preceding the institution of the suit. Appellant contends that the testimony shows that plaintiff came to Dallas on February 12, 1964 and remained here for two and a half days before returning to New York. He returned to Dallas in March 1964 and left again in April and did not return until May. He returned to New York in June and did not return to Dallas until March 1965. Appellant con-

tends that appellee spent approximately ten months in New York City during the year 1964 and in New York City for three months in 1965, during which time he stayed in the George Washington Hotel.

As opposed to appellant's contention, appellee contends and the record demonstrates, that he moved to Texas on February 12, 1964 and rented an apartment, executing a lease for one year. Thereafter he instituted proceedings to transfer a trust of which he was trustee from Boston, Massachusetts to the First National Bank in Dallas. Appellant testified, and such testimony was corroborated by other witnesses, that when he came to Texas he intended to make Texas his permanent residence; that he actually moved his property here, opened a bank account here; qualified to vote here, joined organizations here and did many things demonstrating his bona fide intent to reside in Dallas. He testified that he had reasons for temporary absences from the state, one because of litigation pending against him in Connecticut, it was necessary for him to spend large amounts of time in the vicinity of New York City conferring with attorneys, preparing for court hearings, testifying at hearings, etc.; and secondly, it was necessary that he be in New York City on a number of occasions to receive medical treatment and examinations in connection with a personal injury claim against the City of New York. Moreover, he testified to necessary trips to New York in connection with his business of writing, teaching and publishing.

Though he filed his original petition for divorce on March 15, 1965, the same was amended on De-

cember 6, 1965 and the residential issue, being Special Issue No. 1, was submitted to the jury as to whether or not appellant had been a bona fide inhabitant of the State of Texas for a period of twelve months immediately preceding December 6, 1965. To this the jury answered "Yes".

The trial court correctly limited the special issue regarding residence to the period of one year immediately preceding December 6, 1965, the date of the filing of appellee's amended petition for divorce. **Ingram v. Ingram,** Civ.App., 380 S.W.2d 666; **Myers v. Myers,** Civ.App., 210 S.W.2d 832; **Coleman v. Coleman,** Civ.App. 20 S.W.2d 813; **Bateman v. Bateman,** Civ.App., 188 S.W.2d 866; **Whitsett, et al v. Whitsett,** Civ.App., 201 S.W.2d 114; 20 Tex.Jur2d, DIVORCE AND SEPARATION, § 62, p. 407.

The question presented is not one of jurisdiction but relates to the statutory qualifications of a litigant to maintain a suit for divorce. **Aucutt v. Aucutt,** 122 Tex. 518, 62 S.W.2d 77, 89 A.L.R. 1198.

In determining the sufficiency of the evidence to support the jury's affirmative answer to Special Issue No. 1 relating to the residential requirement we have carefully considered all of the evidence adduced by both appellant and appellee. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660. Having done so, we find that the same is conflicting but such conflict has been resolved by jury verdict. We cannot say that the answer of the jury is so contrary to the great weight and preponderance of the evidence as to be manifestly wrong or unjust. Accordingly, we cannot disturb the jury verdict nor the action of the

trial court in rendering judgment thereon. Appellant's points 7 through 13 are overruled.

Finding no merit in any of appellant's points of error the same are overruled and the judgment of the trial court is affirmed.

AFFIRMED.

WILLIAMS, Associate Justice

DELIVERED:
October 28, 1966.

APPENDIX II.

STATUTES INVOLVED.

SECTION 46-29 OF THE GENERAL STATUTES OF CONNECTICUT (REVISION OF 1958.)

Sec. 46-29 — **Legal Separation.** In any case in which a divorce might be decreed, the superior court, on petition of the party who would be entitled to a divorce, may decree a legal separation of the parties, which separation shall have in all respects the effect of a divorce, except that the parties shall not thereby be made free to marry any third person and except as hereinafter provided. Upon such petition the procedure shall be the same as in actions for divorce, and the court shall have the same power in all matters relating to temporary and permanent orders for alimony, custody and support of children, and to allowances, as in cases of divorce. The parties to such action may at any time resume marital relations, upon filing with the clerk of the superior court for the county in which the separation was decreed their written declaration of such resumption, signed, acknowledged and witnessed. Such declaration shall be entered upon the docket, under the entries relating to such petition.

Sec. 46-30 — **Divorce Subsequent to Legal Separation.** At any time after the entry of a decree of legal separation, either party may petition the superior court for the county where such decree was entered for a decree finally dissolving and terminating the marriage and, if the court finds that the parties have not resumed marital relations since the en-

try of the decree of legal separation, it may enter a decree finally dissolving and terminating the marriage and may affirm or modify any existing orders and may enter any additional orders relating to alimony, custody and support of children and allowances as are usual in divorce cases.

APPENDIX III.

PERTINENT PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES.

AMENDMENTS, ARTICLE V.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life, limb, nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENTS, ARTICLE XIV.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

SUPREME COURT, U. S.

JUN 23 1967

JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

October Term, 1966.

No. [redacted] 199

MARGUERITE LOVELETT NOWELL,

Petitioner,

v.

AMES NOWELL,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the

Supreme Court of the United States

October Term, 1966.

No. 1430

MARGUERITE LOVELETT NOWELL,

Petitioner,

v.

AMES NOWELL,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent prays that the petition for a writ of certiorari to review the judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas rendered between the above parties on October 28th, 1966, be denied in all respects.

The record on which said judgment is based does not contain any ground whatever for the issuance of a writ of certiorari to review the judgment and refutes the contentions made in the petition for such writ.

Since the petition fails to state the material facts as required by Rule 23, 1 (e), of the Rules of this Court, Respondent calls to the attention of the Court the following facts, omitted from the petition, which are determinative.

STATEMENT OF CONTROLLING FACTS

(1) The original petition for divorce of Respondent Ames Nowell, which was filed in the Domestic Relations Court of Dallas County, Texas, on March 15, 1965, sought merely a judgment of divorce, made no claim for a personal judgment of any kind and alleged that the defendant (Petitioner herein) was a resident of Darien, Connecticut (see "Plaintiff's Original Petition").

(2) Although the motions and pleas filed by the Petitioner herein in response to said petition for a divorce contained an assertion of absence of jurisdiction over her person, this claim was not pursued and the assertion of same was not the purpose or object of the motions and pleas.

(3) Said motions and pleas consisted of attacks upon the Respondent's allegation in his petition for divorce of having been a resident of Texas for twelve months, attacks upon the jurisdiction of the court over the subject matter of the action, and contentions based upon ex parte injunctive orders of the Connecticut courts, and the purpose of said motions and pleas was to raise issues regarding Respondent's residence, jurisdiction over the subject matter, and said ex parte injunctive orders (see "Defendant's Sworn Motion Challenging Jurisdiction of the Court over Her Person in Temporary Injunction Proceedings", filed September 16, 1965; "Defendant's Sworn Motion Challenging Jurisdiction of the Court Over Her Person", filed September 24, 1965; "Statement of Facts" of hearing on October 22nd, 1965; Defendant's "Plea in Abatement", filed October 25th, 1965; "Defendant's First Amended

Plea in Abatement", filed December 8, 1965; and "Defendant's Brief in Support of Plea in Abatement", filed December 9, 1965).

(4) Petitioner filed in said Domestic Relations Court, in response to Respondent's said original petition for divorce, an answer denying all of the material allegations contained in such petition and demanding strict proof thereof and praying that the suit be dismissed (see "Defendant's Original Answer", filed October 25th, 1965).

(5) Petitioner filed in said Domestic Relations Court, in response to said original petition for divorce, an amended answer denying all of the material allegations contained in such petition and demanding strict proof thereof, pleading the defense of recrimination, alleging that a pre-nuptial property agreement executed by the parties was invalid, alleging that the parties had accumulated community property, demanding that Respondent be required to file a sworn inventory of the assets and liabilities of the parties, alleging that the Petitioner had retained counsel to appear for her in the action, and praying that the pre-nuptial agreement be declared null and void, that Respondent be required to file an inventory and appraisement of the community property, and that Respondent be required to pay to the Petitioner a reasonable fee for her attorneys (see "Defendant's First Amended Original Answer", filed December 8, 1965).

(6) Petitioner filed in said Domestic Relations Court, in response to "Plaintiff's First Amended Original Petition" for

divorce, a second amended answer denying all of the material allegations of said amended petition and demanding strict proof thereof, alleging that a pre-nuptial property agreement executed by the parties was invalid, denying that the Respondent had listed all community property of the parties, alleging the defenses of recrimination and condonation, and praying that said pre-nuptial agreement be declared null and void, that all community property of the parties be set aside for the sole benefit of the Petitioner, and that the Respondent be required to pay to the Petitioner reasonable attorneys' fees for the services of her attorneys in the action (see "Defendant's Second Amended Original Answer", filed December 14, 1965).

(7) Petitioner demanded a trial by jury of the issues raised by said pleadings and, pursuant to said demand, a jury was duly called for such trial.

(8) Petitioner voluntarily appeared by counsel and in person at the trial of said action for divorce in said Domestic Relations Court on December 15, 16, 17 and 18, 1965, testified at length on the issues at the trial before the court and jury, called witnesses who testified on Petitioner's behalf at the trial, and contested the issues throughout the trial to the entry of the judgment (see transcript of proceedings at said trial).

(9) At said trial the Petitioner stipulated and consented that the issues relating to the pre-nuptial property agreement

and the property rights of the parties be determined by the court and not be submitted to the jury, and the court, after considering the pleadings and evidence and in reliance upon the stipulation and consent of the parties, adjudicated such issues, and the attorneys for Petitioner approved the judgment as to form by subscribing their names thereto (see "Judgment", signed and entered December 22, 1965, pages four, eight and nine).

(10) Petitioner did not at said trial or in her motions for a new trial object or contend that the court lacked jurisdiction to adjudicate regarding said pre-nuptial agreement and property rights by reason of lack of jurisdiction over the person of Petitioner, and the Petitioner did not object or contend that such adjudication would constitute, or constituted, a denial of due process of law under the Constitution of the United States.

(11) Said Domestic Relations Court concluded and held that the Petitioner's participation in, and resistance to, said action for divorce constituted a general appearance and submission to the jurisdiction of the court (see "Judgment", signed and entered December 22, 1965, pages one, two, three and four).

(12) Petitioner did not in the Court of Civil Appeals urge or brief, as a ground for reversal, the formal assertion of lack of jurisdiction over her person, and the Petitioner did not assert, urge or brief in that court any claim that the ad-

judication of property rights by the trial court violated due process of law under the Constitution of the United States (see "Appellant's Brief" in Court of Civil Appeals).

(13) The injunctive order of the Connecticut court of September 9, 1965, was issued ex parte, without notice to Respondent and without a hearing of any kind. The order was based upon a petition which implied that Respondent was a resident of Connecticut whereas prior thereto he had ceased to live or reside in Connecticut and had become a resident of Texas. It was hurriedly obtained in the afternoon of the day on which the Petitioner was served with an order of the Texas court enjoining her from interfering with the jurisdiction of the latter court in the divorce action. (See opinion of Court of Civil Appeals, pages 3, 7).

(14) Said injunctive order of the Connecticut court was a temporary order which did not purport to determine or adjudicate any aspect of the merits of litigation between the parties. No hearing was ever held before the Connecticut court to determine whether Respondent was a resident of that state when the order was issued. No other hearing was held on the order, except a motion was made under a special appearance to erase the order on the ground the court lacked jurisdiction to issue the same, and Respondent's application to the Supreme Court of Connecticut for a review of the order denying the motion was dismissed on the ground the order was not appealable.

NO FEDERAL QUESTION IS PRESENTED

No Federal question of due process of law is presented because the Petitioner voluntarily appeared in the action for the purpose of contesting Respondent's allegations of grounds of divorce as well as his allegation of residence in Texas, stipulated and consented that the trial court adjudicate the issues relating to the property rights of the parties, and did not in the trial court or in the appellate court of Texas argue or brief any claim of denial of due process of law under the Constitution of the United States.

Moreover, no Federal question of due process of law is presented because any question as to whether Petitioner's participation in the litigation of the action constituted a general appearance and submission to the jurisdiction of the Texas courts, or as to whether the Texas trial court acquired jurisdiction over the person of Petitioner, is a question of Texas law which was determinable by the Texas courts.

No Federal question of full faith and credit is presented because the Connecticut injunctive order was not a judgment or adjudication of a sister state entitled to compulsory recognition under Article IV, Section 1, of the Constitution of the United States.

No Federal question of denial of comity is presented because the ruling of the Texas courts with respect to said injunctive order was a discretionary determination which was in no way forbidden by the Constitution of the United States.

ARGUMENT AND AUTHORITIES

The contentions made by the petitioner for the granting of a writ of certiorari are without foundation in fact or in law.

A

No Violation of the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States Occurred or Has Been shown

Since the Respondent's original complaint for divorce alleged that the Petitioner resided in Connecticut and did not demand any personal judgment against her and since process was served upon the Petitioner outside the State of Texas, it was obvious that the Petitioner was not required to appear and participate in the action and that she was free to refrain from such an appearance and participation. *Rice v. Rice*, 336 U.S. 674 (1949).

Instead of remaining out of the case the Petitioner concluded, evidently after careful consideration, to resist the action in every possible way and on all of the issues, including the merits, through the courts of Texas and then to this Court.

Thus, in the trial court the Petitioner attacked the Respondent's allegation of residence in Texas and the court's jurisdiction over him and the subject matter, denied the Respondent's allegations of grounds for divorce and pleaded the defenses of recrimination and condonation, at-

tacked a pre-nupital property agreement between the parties and sought to have it declared invalid, alleged the existence of community property and voluntarily brought the financial relationships of the parties into the case, demanded a trial by jury, appeared and testified at the trial and called witnesses who testified thereat, consented that the issues relating to the pre-nuptial agreement and property rights be determined by the court alone, and approved the form of of the judgment entered after the trial.

It is apparent that the purpose of said participation in the action was to contest all of the issues, including those relating to the merits and property rights, and to prevent the trial court from granting any judgment of divorce whatsoever. By their very nature and number the acts of participation and resistance constituted a general appearance and submission to the jurisdiction of the Court, and the trial court was clearly justified in treating the Petitioner's participation and resistance as a general appearance.

Although in the early stages of the litigation the Petitioner filed motions purporting to challenge the jurisdiction of the court over her person under Rule 120a of the Texas Rules of Civil Procedure, the arguments in support of such motions and pleas consisted of attacks upon the Respondent's allegation of residence in Texas and contentions based on the ex parte Connecticut injunctive orders. Said Rule 120a permits a special appearance only "for the purpose of objecting to the jurisdiction of the court over the person or property of the defendant on the ground that such party or property is not amenable to process issued by the courts

of this State" and specifically provides that, "Every appearance, prior to judgment, not in compliance with this rule is a general appearance." The contentions and acts of the Petitioner clearly went beyond the limited scope of Rule 120a and constituted a general appearance. *Davis v. Davis*, 305 U.S. 32, 42-43 (1938); *York v. Texas*, 137 U.S. 15 (1890); *Henderson v. Henderson*, 247 N.Y. 428, 160 N.E. 775 (1928); 42 Texas Law Review, 279, 312-313, 317-318 (1964).

The respondent originally sued for a divorce only dissolving the marriage of the parties. In such an action jurisdiction over the person and property of the defendant is unnecessary. *Williams v. North Carolina*, 317 U.S. 287 (1942). The trial court was competent to find and did so find that the Respondent fulfilled Texas residence requirements necessary for a judgment of divorce. *Durfee v. Duke*, 375 U.S. 106, 111-112 (1963); *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 376-378 (1940), *Aucutt v. Aucutt*, 122 Tex. 518, 62 S.W. 2d 77 (1933), 89 A.L.R. 1198. The Connecticut injunctive orders, having been issued in an action for a separation only, were not entitled to recognition in the Texas courts since a separation action is vitally different from an action for divorce. *Pettis v. Pettis*, 91 Conn. 608, 101 Atl. 13 (1917); *Perusse v. Perusse*, 402 S.W. 2d 931 (1966). For these reasons, the trial court correctly overruled Defendant's Motion Challenging Jurisdiction of the Court over Her Person. Thereafter the Petitioner voluntarily appeared and contested the divorce action upon the merits and this conduct constituted a general appearance giving the trial court in personam jurisdiction over the petitioner. *Davis v. Davis*,

305 U.S. 32, 42-43 (1938); *York v. Texas*, 137 U.S. 15 (1890). By the time the trial was concluded the Petitioner had abandoned any pretense of claiming lack of jurisdiction over her person.

Especially significant is the indisputable fact the Petitioner stipulated and consented that the trial court determine the issues relating to the pre-nuptial agreement and the propery rights of the parties, which stipulation and consent is stated in the judgment entered at the conclusion of the trial as follows:

> "Further, came the parties, in person, and by stipulation through their respective attorneys of record, and consented that the Court, based upon the pleadings and the evidence, determine the issues raised by the pleadings regarding the Pre-Nuptial Agreement executed by the parties on or about April 3, 1957, and the respective rights of the parties in and to certain items of property acquired during the course of this marriage, which issues by agreement of the parties and their respective counsel, were not submitted to the jury."

This stipulation and consent, together with the Petitioner's other active participation in the litigation, clearly shows that she voluntarly submitted to the jurisdiction of the court, that the adjudication of the issues relating to the pre-nuptial agreement and property rights was in accord with due process of law, and that Petitioner's claim that the court went beyond the limitations of due process in adjudicating the financial relationships of the parties is without merit in fact or in law.

The adjudication of the merits of the issues relating to the pre-nuptial agreement and property rights of the parties

constituted a finding or conclusion that the Petitioner had appeared generally, which finding the court was empowered to make. *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940); *York v. Texas*, 137 U.S. 15 (1890).

Moreover, at the trial the Petitioner did not question the trial court's jurisdiction to adjudicate the issues relating to the pre-nuptial agreement and property rights of the parties on the ground of lack of jurisdiction over the person of the Petitioner or on any other ground and did not contend that the adjudication of such issues by the trial court would exceed, or exceeded, the limits of due process of law. The failure to raise such objections at the trial precluded the raising of such objections on appeal. 4 C.J.S., *Appeal and Error*, Sec. 228, p. 665.

Although in the appellate court of Texas the Petitioner formally asserted that the trial court erred in overruling her motion challenging the jurisdiction of the court over her person, the Petitioner failed to urge or brief the asserted point and thereby waived the same. 4 Texas Jurisprudence 2d, *Appeal and Error*, Sec. 658, pp. 166-167. The Petitioner did not even assert in said appellate court any claim that the adjudication by the trial court of the property rights of the parties violated due process of law.

The failure of the Petitioner to assert and pursue in the courts of Texas, in accordance with the procedure of that State, the alleged question of due process of law precludes review of the same on certiorari by this Court. *Beck v. Washington*, 369 U.S. 541, 549-554 (1962).

B

No Violation of the Full Faith and Credit Clause Is Presented.

The injunctive order of the Connecticut Court of September 9th, 1965, was admittedly a temporary order which did not purport to adjudicate the merits of any aspect of the Connecticut action between the parties. Such an order is not entitled to full faith and credit. *Swift v. McPherson*, 232 U.S. 5 (1914); 50 C.J.S., Judgments, Sec. 889, pp. 478-479.

The order was issued ex parte, without notice to the Respondent and without a hearing of any kind, and was based on a petition which represented, contrary to fact, that the Respondent was a resident of Connecticut.

The order was not appealable until the entry of a final judgment determining the action. Connecticut Practice Book (1963), Sec. 600; Maltbie, *Connecticut Appellate Procedure* 2d Ed., 1957), Sec. 10, p. 11, Sec. 15, p. 18.

If the order had any effect it applied only to the person of the Respondent and did not operate on the Texas court. *Steelman v. All Continent Co.*, 301 U.S. 278, 291 (1937); *Cunningham v. Cunningham*, 25 Conn. Sup. 221, 200 A. 2d 734 (1964); *Kleinschmidt v. Kleinschmidt*, 343 Ill. App. 539, 99 N.E. 2d 623 (1951).

It is well established that an order enjoining a party from prosecuting an action in another state is not entitled to com-

pulsory recognition in the courts of the latter jurisdiction. *James v. Grand Trunk & Western Ry. Co.*, 14 Ill. 2d 356, 152 N.E. 2d 858 (1958), cert. den. 358 U.S. 915 (1958); *Kepner v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.*, 322 Mo. 299, 15 S.W. 2d 825 (1929), cert. den. 280 U.S. 564 (1929); *Frye v. Chicago, Rock Island & Pacific Ry. Co.*, 157 Minn. 52, 195 N.W. 629 (1923), cert. den. 263 U.S. 723 (1923); Restatement, Conflict of Laws, Sec. 450, p. 534; Ehrenzweig, *Conflict of Laws* (1962), Sec. 77, p. 262; 21 C.J.S., *Courts*, Sec. 554, p. 860.

Petitioner's contention that the Connecticut injunctive order was entitled to compulsory recognition in the courts of Texas is entirely without merit and presents no Federal question.

C

No Federal Question of Comity is Presented

The doctrine of comity is correctly defined in the opinion of the Court of Civil Appeals. 408 S.W. 2d 550, at p. 553. Since, as there explained, comity is a matter of courtesy and discretion and not of absolute right, the decision of the Texas trial court to decline comity to the ex parte Connecticut injunctive order and the affirmance of that decision by the Court of Civil Appeals do not raise any Federal question whatever. The decision and the affirmance were based upon a full consideration of the relevant facts and circumstances and the law applicable thereto and clearly are not reviewable by this Court.

CONCLUSION

For the reasons hereinabove stated the petition for a writ of certiorari should be denied in all respects.

Respectfully submitted,

HARRIS, ANDERSON, HENLEY & SHIELDS,

By .....
Lawrence W. Anderson

By .....
Charles O. Shields

Counsel for Respondent.